NO. 14494

In the
United States
Court of Appeals
for the Ninth Circuit

BARTOLOMEO MONGE,

Petitioner,

vs.

JAMES G. SMYTH, Collector of Internal Revenue for the First District of California,

Respondent.

Petition for Rehearing

Wareham C. Seaman
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Attorney for Appellant

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and filed March 11, 1953, (Tr.-33). This motion was denied September 29, 1953 (Tr.-34) but the Court did dismiss the first amended complaint (even though answered and ready to be set for trial) but with leave to amend because "the affidavit filed in opposition to the motion to dismiss suggests that it may be possible for plaintiff to so amend his complaint as to remedy this deficiency" (Tr.-34). The affidavit referred to raised the issue of the validity of the waiver later put in issue in paragraph II of the second amended complaint (Tr.-37) which the second lower Court said raised no new issues (Tr.-48).

4. Sixth sentence, second paragraph — "Therein (second amended complaint) appellant alleges that respondent, etc." The allegations set forth were in the original complaint (Tr.-3), the essential allegations being that of adverse representation known to respondent (Tr.-4, par. 3).

5. Eighth sentence, second paragraph—"Abraham Buchman . . . having adverse interest . . . known to representatives; execution of the waiver (for) income tax greatly in excess of the correct tax liability . . . resulting in a fraud." Nowhere in any of the complaints or affidavits is fraud on the plaintiff by anyone alleged or suggested as a conclusion although the allegations could clearly support such finding; nor does the word "fraud" appear except in reference to the penalty.

6. Twelfth sentence, second paragraph — "Respondent moved to dismiss the action on the

ground that . . . " This motion, if in reference to the original complaint, was to dismiss the complaint and not the action (Tr.-20).

7. Second sentence, third paragraph — "Thereafter an order was entered granting the motion." This motion was in reference to the original and first amended complaint and was *not* granted (Tr.-34). See No. 3 above.

8. Last sentence, third paragraph — "It was from this Order that this appeal is taken." The Order appealed from is that of July 1, 1954 (Tr.-48), inasmuch as the Order referred to was not appealable as found by this Court in the prior action (Tr.-31).

9. Fifth paragraph — "The Court stated that no issues of law were presented other than theretofore ruled upon when it dismissed the first amended complaint." It was this Order of July 1, 1954, dismissing the action, which gives jurisdiction for this appeal and is one of the errors specified in that a new issue was presented (Tr.-37, par, II, raising issue of validity of waivers).

10. Omitted from Footnote No. 1 in reference to the facts set forth in the affidavit was the following:

(a) "That plaintiff's tax liability was based almost entirely on such transactions" (Tr.-10) with Atlas, a fact known to respondent.

(b) That "certain facts concerning these types of manipulations (double weight certifi-

cates and cash advances to Buchman) had become known" to respondent during investigation and conference (Tr.-11).

(c) That "the form 870-TS filed by plaintiff had been prepared in blank, no amount of deficiency being shown thereon" (Tr.-12).

11. Last sentence, paragraph seventeen — "If he does file a waiver he is benefited by thereby stopping the running of interest for thirty days after filing." The effect of a waiver is to stop the running of interest after thirty days from filing. Sec. 292(a), 1939 IRC, providing that interest shall be collected "in the case of a waiver under sec. 272(d) to the thirtieth day after the filing of such waiver or to the date that deficiency is assessed, whichever is the earlier." It might be pointed out that the only benefit received by Monge from the execution of the waiver was the interest from December 2, 1949 (thirty days after signing of the waiver on November 2, 1949) to to December 28, 1949, a matter of twenty-six days.

12. First sentence, last paragraph — "Although plaintiff's affidavit (Footnote No. 1) revealed that Monge received a notice of deficiency" . . . This is what plaintiff prays for, which respondent refuses to give under sec. 272(a), 1939 IRC, and such prayer is in conformity with prior rulings of this Circuit.

13. Last sentence, last paragraph — "More time than the ninety-day restrictions elapsed between these dates . . . " In the absence of a notice

of deficiency this statement is meaningless, confusing and has no application to the income tax laws or to the opinion of this Court.

GROUNDS FOR REHEARING

I

The opinion emphasized and relied upon a change in the 1954 Code not applicable to the years at issue.

Sec. 6213(d) cited and relied upon is found in the 1954 Internal Revenue Code and is effective only on and after August 17, 1954 (Sec. 7851(a) (6) (A)) and is not applicable under the 1939 IRC (Sec. 7851 (a) (6) (B)). The italicized portion cited and relied upon is not a part of the 1939 Code which is effective for the years at issue.

Furthermore, it is respectfully submitted that sec. 6213(d) cited in the opinion, refers only to subsection (a) of the same section and not to sec. 6212, 1954 IRC, headed "Notice of Deficiency" which says: "If the Secretary . . . *determines* there is a deficiency . . . he is authorized to *send notice* of such deficiency . . . ," (emphasis supplied), thereby requiring two separate acts, (a) a determination, and (b) sending notice of such determination. Were both of these requirements to be waived, then sec. 6213(d) is ill-worded or ill-placed, although sec. 6213(a) does contain mention of the notice but not of the determination. This distinction, relied upon in this Circuit in prior decisions, is discussed more at length under Ground No. IV.

Appellant respectfully suggests that the court's decision does not distinguish the "determination" from the

"Notice of Deficiency," the failure of either making the waiver invalid uhder the prior decisions of this court.

II

The findings of fact relied upon in the opinion were contrary to allegations, the only facts before the Court in the absence of a trial.

A. Adverse Interest With Knowledge by Respondent:

The opinion finds that Buchman would not be "breaching his obligations as an attorney or that the Government was thereby charged with knowledge that a fraud was being perpetrated" by Buchman serving two masters.

The complaints allege adverse representation with knowledge by respondent, and in the absence of trial should be accepted as true. Such facts have not been denied by the respondent in any pleadings or trial.

The Rules of Professional Conduct, approved by the California Supreme Court, and analogous to the Canons of Ethics of the American Bar Association, state in Rule 6:

> "A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment."

It is respectfully submitted that plaintiff was aware of Buchman's relationship, but unaware that his relation or interest was adverse, as alleged in the original complaint (Tr.-4) and affidavit (Tr.-11).

Rule 7 states:

"A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned."

Plaintiff has alleged that Buchman had such adverse interest, known to respondent but not to him (Tr.-4), therefore plaintiff could not consent.

That the respondent knew of and benefitted from this breach is alleged (Tr.-4, par. 3). He takes sanctuary (in his brief but not pleadings) as not being responsible for plaintiff's representation and that the knowledge by the respondent was not "definitely" shown (Br.-25), which would and should be a matter of proof on trial. And, while technically or legally not "responsible", knowledge goes a long way toward a species of fraud. *1 Story, Eq. Jud., 258,* in reference to acts contrary to good conscience operating to the injury of another.

Assuming the facts as alleged it is inconceivable that this Court would sanction such gross abuse of administrative duty to see that tax liability was fairly and properly imposed, not as to amount but in procedure.

B. Irreparable Injury.

The Court finds there would be no irreparable injury should respondent not be enjoined, pointing out that redress could follow from a refund. Such could not be inferred from the allegations, nor was it so held by the decisions in *Midwest Haulers, Inc., v. Brady 128 F 2d 496* and *John M. Hirst & Co. v. Gentsch, 133 F 2d 247,* cited with approval in the decision. Whether there

was irreparable injury within the rule of these cases is a question of fact to be proved in trial in support of the allegations.

C. General

It will be recalled that at the oral hearing the Court indicated that it was interested in certain facts in support of the allegations and in answer to questions raised by opposing counsel. Specifically, the Court asked why the reduction of Monge's liability by some $20,000.00 was made in conference, as suggested by opposing counsel and in his brief (Footnote page 25). Counsel, with almost fiendish delight would have liked to answer this question, relying upon an affidavit of an officer of the respondent as one of the best items of proof of the gist of appellant's allegation of adverse interest with knowledge by the respondent. Counsel was precluded from answering because such facts were not in the record. He pointed out that there had been no trial to adduce the facts; that there were no stipulations to rely upon; that such facts were alleged and in the affidavits and were uncontroverted; and that it would be impossible within the limitation of this Court on length of briefs to fully set forth all the facts.

This emphasizes the necessity for a full hearing or trial on all the facts, and demonstrates the possible injustice of a decision without the knowledge of all the facts.

In effect, this case has been tried without a trial with this Court making some initial findings of fact, some contrary to uncontroverted allegations, and deciding issues of law not considered or tried in the lower Court.

III

As the basis for its decision the Court imputes to appellant issues not raised by him.

A. Fraud

Appellant has not alleged fraud. Had he done so "clearly", then the form 870-TS would have been invalid *ab initio* or it could have been reopened by its express terms.

Plaintiff does allege such adverse interest with knowledge by respondent as to be unconscionable, justifying the intervention of equity on the ground of unusual and extraordinary circumstances to avoid the bar of sec. 3653(a), 1939 IRC. The decision indicates that fraud must be present, and appellant respectfully submits that this is contrary to all the decisions unless coercion, arbitrary acts and duress are such as to constitute fraud.

The appellant respectfully invites the Court's attention to its citing with approval in the case of *Yoshimura v. Alsup,* CA 9, 167 F 2d 104, the case of *Miller v. Nut Margarine Co.,* 284 U. S. 498 that

> "it requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be *arbitrary and oppressive,* would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that by reason of the special and *extraordinary facts and circumstances,* Sec. 3224 (now 3653(a)) does not apply. The lower Court rightly held respondent entitled to the injunction."

> In the *Yoshimura* decision, supra, the Court further said: "We can see no difference in a coercion by statute and such coercion by the statutory officers for the enforcement of the tax laws."

citing the case of *Matcovich v. Nickell, 134 F 2d 837* as showing such coercion being sufficient as "the unusual and extraordinary case"; the case of *Concentrate Mfg. vs. Higgins, 90 F 2d 439,* on the ground of "gross and indisputable oppression"; and the case of *Burke v. Mingori, 128 F 2d 996* on the "arbitrary and capricious conduct" of the Government.

Here plaintiff alleges such adverse interest with knowledge by the respondent, with detriment to the plaintiff but none to the respondent, with resulting benefits to the respondent from taxes not due and which the respondent should know are not due under the Internal Revenue Code, that make the whole unconscionable, easily justifying the Court's impression that it almost amounted to an allegation of fraud.

B. Hardship

Appellant did not seek the injunction on the ground of hardship although failure to enjoin would clearly result in such. He does not seek sympathy and knows such is not a ground for injunction. The facts alleged were for the purpose of supporting the necessary allegation of irreparable injury as a prerequisite to injunction on the ground of adverse interest with knowledge by the respondent.

C. Illegality of Taxes

Appellant does not allege that the tax laws are illegal and did not seek the injunction on that basis. He does allege, but does not rely on for the injunction, that he is not guilty of fraud, is being taxed for the liability of his putative wife, Mary Salamone, and for money properly taxable to Atlas.

D. Overbearing Conduct in Collection

Appellant does not criticize the methods or determination of the respondent to collect. That is proceeding according to law. He does object to the arbitrary and capricious refusal of respondent to review the tax liability of plaintiff or to allow any Court to review it, taking sanctuary in an agreement made under the unconscionable facts alleged, and which appellant contends is invalid.

IV

The Court's opinion is contrary to that of earlier decisions in this Circuit.

The only reference in the opinion of these earlier decisions is in Footnote 12, *Mutual Lumber Co., v. Poe, CA-9, 66 F 2d 904,* distinguishing on the ground that that there the waiver was unilateral, on form 870. If so, it also was a "Waiver of Right to File a Petition with the United States Board of Tax Appeals," a provision not in either the form 870 or 870-TS used during the years at issue, nor in the form 870-TS at issue, although much more binding and explicit in denying right to take to Court. Moreover, it was not unilateral

as a form 870 under sec. 272(d), 1939 IRC, because the Commissioner ignored it and issued a notice of deficiency, as he asserts he would have the right to do according to the terms of the form 870-TS at issue, but not according to a waiver under sec. 272(d), 1939 IRC, indicating that in fact and law the waiver was bilateral, regardless of label.

In that decision the Court cites the equivalent to sec. 272(a), 1939 IRC,

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, etc.",

then says,

> "This condition set out at the very beginning of the section assuredly qualifies all the other provisions contained in such section."

further,

> "If there is *no* determination by the Commissioner, there is no right of appeal for the taxpayer to waive; . . . For this reason we hold that the purported waiver was filed with the Commissioner before the latter had found any deficiency, was therefore premature, and was powerless to prevent the Commissioner's resort to a letter of deficiency, by which the running of the statute was suspended."

Taxpayer alleged, and respondent has not denied, that the form 870-TS in issue "had been prepared in blank, no amount of deficiency being shown thereon" (Tr.-12). It is respectfully pointed out to the Court that the form 870-TS set forth as Footnote 2 and as an exhibit of the respondent has at the bottom "This copy to be retained by Petitioner", proof that it was never delivered to Monge, raising the issue of whether

there had ever been execution of the waiver by the respondent, making it bilateral, within the terms of the case of *McCarthy Co. v. Commissioner, CA-9, 80 F 6d 618,* citing the California Code of Civil Practice that "execution" includes "delivery."

In both the *Mutual Lumber* and *McCarthy* cases, supra, respondent treated the waivers as unexecuted bilateral waivers and issued the notices of deficiency. In both cases this was noted by the Court, but the decisions went further as shown by the above excerpts, namely, that the waivers were invalid because premature in the absence of determination. Certiorari was denied in both cases.

The *McCarthy* case, supra, went even further, saying,

> "It has already been decided by this Court that a waiver (to file a petition to the Board) or consent (for assessment) of that kind filed before the Commissioner has sent a notice of deficiency (under 272(a), 1939 IRC) is premature and therefore invalid." (Parentheses supplied)

citing the *Mutual Lumber Co.*, supra, and quoting from the case as set out above.

East Bay Water Co. v. McLaughlin, Dist. Ct. No. Calif., 24 F. Supp. 222, CA-9 dism'g 104 F 2d 1016, states

> "The Government contends that *any* waiver filed *prior* to the *determination* of an assessment *is* premature and *invalid* . . . " (emphasis supplied)

This is the same position of the respondent and the Court in the *Mutual umber* and *McCarthy* cases, supra, and pleaded by the plaintiff as the rule in the instant case. For this Court to sanction the respondent's

change of mind with no intervening statutory support, requires reversal of the above cases.

The *East Bay* case, supra, cited the *Mutual Lumber* case, supra, by saying,

> "It was there insisted that it had been the practice of the Commissioner to allow waivers prior to assessment of deficiencies, and that the Court should give heed to this practice in its determination. In reply to this the Court said: (P 907)
>
> 'Granting that such was the custom and that the practice of an executive department charged with administering a statute has great weight with the Courts, such practice is not binding upon a judicial tribunal in the face of the plain terms of the statute.' "

It will be noted that the rule applies to all waivers under sec. 272(d), 1939 IRC, with no exceptions and without distinguishing between unilateral and bilateral.

The Court then quotes from a report of a subcommittee of the House Ways and Means Committee taking cognizance of the above rules of the *Mutual Lumber* and *McCarthy* cases, supra, which does not differentiate species or varieties of waivers under sec. 272(d), 1939 IRC, as did the Court in this decision; and the Court noted that Congress had not seen fit to change the rule, nor had it done so before the years at issue.

The decision in the instant case would ignore the above rule by insisting that the form 870-TS, while a child of sec. 272(a), the subject of the above cases, is beyond its rules because it is bilateral, even though the above cases dealt with waivers treated by the respondent as bilateral, and accepted by the Courts as bilateral.

V

The form 870-TS has no statutory basis in the Internal Revenue Code.

That form 870 is unilateral is conceded by the Court and the respondent (Br.-31). That sec. 272(d), 1939 IRC, was also intended by Congress to be unilateral is clearly indicated by the legislative history of that section, most clearly shown by the committee reports on the initial enactment, with no intervening statutory change. The Senate Finance Committee Report, 69th Cong., First Sess., S. Rept. 52, adopted and followed by the Conference Report, after discussing the impact of interest rates resulting from administrative delays in assessment, stated,

> "In order to permit the taxpayer to pay the taxes and stop the interest, the Committee recommends in sec. 274(d) of the bill (now 272(d), 1939 IRC) that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax *but without taking away the right of the taxpayer to take the case to the Board,* (now the Tax Court)". (Emphasis supplied)

Neither in the statutory language nor in the above committee report is there a requirement that the waiver be accepted, be bilateral, or that the taxpayer waive a multitude of other rights as a *sine qua non.* Reserving the right "to take the case to the Board" is a reservation intended by Congress that would be a nullity unless the notice under sec. 272(a), 1939 IRC, were issued, and clearly supports the prior rule in this Circuit that a determination *and* notice of deficiency under sec. 272(a), 1939, IRC are required even

with a waiver, as jurisdictional to "taking the case to the Board".

There is nothing in sec. 272(d) authorizing the Commissioner to make the agreement on his part as recited in the 870-TS. Such authorization is expressly found in sec. 3760, 1939 IRC, for a closing agreement under that section, as follows:

(a) Authorization — *"The Commissioner . . . is authorized to enter into an agreement in writing* with any person relating to the liability of such person . . .

(b) Finality — *If such agreement is approved by the Secretary . . .* such agreement *shall be final* and conclusive, and, *except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—*

(1) The case shall not be reopened . . . (emphasis supplied).

The emphasized portions bear striking similarity to the essential parts of the form 870-TS, particularly those parts relied upon by the Court in this decision. By making the 870-TS subject to the approval of the Commissioner and requiring the taxpayer to agree to the formality of executing a closing agreement under sec. 3760, 1939 IRC, the form 870-TS has all the attributes of such closing agreement. In fact, the form 870-TS is even more binding.

It is respectfully submitted that the most liberal construction of sec 272(d) does not authorize the finality of form 870-TS, that such authority is reserved to sec. 3760, 1939 IRC, and that the Commissioner by using such form is using a waiver, intended

to be unilateral and a relief to the taxpayer, as a substitute for the agreement provided in sec. 3760, 1939 IRC. In form 870-TS, the Commissioner is assuming power reserved to and the subject of an express power of approval in a higher officer.

VI

The decision is in conflict with the First and Third Circuits and its own prior decisions.

In *Associated Mutuals v. Delaney, 176 F 2d 179* and *Victory v. Manning, 128 F 2d 415,* cited with approval in the decision, as well as the *McCarthy* and *Mutual Lumber Co.* cases, supra, it is held that the issue of validity of the waivers should be determined before the issue of jurisdiction. Here, the trial court refused to consider the issue of validity, dismissing without a trial on the merits, and this Court affirms such dismissal contrary to the uncontroverted allegations of invalidity.

VII

The decision is contradictory and ambiguous in its ruling on appellant's right to file claim for refund.

Paragraph 3, page 8, of the decision says:

> "The statement of appellant that he has no adequate remedy at law is met by the statement that he may bring an action to recover taxes illegally assessed and paid by him."

Paragraph 3, page 9, says:

> "The refunding provision provides the taxpayer may recover all he pays if he does not owe the taxes. Since any wrong he suffers may be remedied by a money consideration, a denial of an injunction does not work irreparable injury."

Last paragraph, page eleven, says:

> "Thus we have a bilateral agreement which includes the waiver which when accepted on behalf of the Commissioner 'shall not be reopened nor shall any claim for refund be filed respecting the taxes . . . ' The acceptance by the Commissioner effected a final determination of deficiency and rendered unnecessary a formal deficiency determination."

Should there be no right to file claim for refund, irreparable injury is unquestionable.

If the right survives, then irreparable injury depends on uniqueness as found in *Midwest Haulers* and *John M. Hirst* cases, supra, cited with approval in the decision. That such uniqueness exists here is alleged (Tr.-13) and is discussed more fully under Ground No. II. Money is no substitute for one's home of thirty-five years, a vineyard constituting one's sole livelihood, complete destitution and loss of needed medical treatment, particularly when that money, on forced sale, will be less than true market value.

VIII

The decision is in error in holding that the waiver eliminates notice of jeopardy assessment.

The decision states that the waiver removes the restriction on assessment. It would do violence to the Congressional intent, the plain statutory language, and the previous decisions of this Court and other Courts, cited with approval in this decision, to hold that the waivers may be executed after assessment and be effective to stop the running of interest.

Sec. 273(d) relating to jeopardy assessmens, says:

> "If the jeopardy assessment is made before any

> notice in respect of the tax to which the jeopardy assessment relates has been mailed under sec. 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment."

If the notice has already been mailed we have no problem because the taxpayer still has the right of appeal to the Tax Court. Waiver at that time would be proper under the clearly expressed intent of Congress and the prior decisions in this Circuit. If the jeopardy assessment is made before the notice is sent, then the waiver would be inapplicable because of the *fait accompli* in issuing the assessment. It is respectfully suggested that the Commissioner would be the last person to accept or honor a waiver after an assessment is made thereby stopping the running of interest. Therefore, a waiver would be valid only if a notice is sent before assessment (not done in the instant case) and a nullity if signed after assessment (not done in the instant case).

Whether a jeopardy assessment was made is a question of fact. It was alleged (Tr-21 and 40), summary judgment for respondent was denied (Tr.-31), and answered by respondent (Tr.-29). The decision does not attempt to find whether a jeopardy assessment was actually made.

CONCLUSION

Appellant appreciates that this Court is torn between its sympathy for Monge and its duty to protect the Federal revenues. His entire effort has been to have a hearing on the facts in the belief that the shock to the conscience of the Court will outweigh its regard for protection of the revenues, particularly since the respondent would not be injured by such hearing should appellant be in error. It is noted that the decision omits any reference to the allegations and affidavit supporting the exhaustion of administrative remedy. In this connection the comments of the lower Court (Tr.-53) indicate the basic controversy in this matter. All that the plaintiff asks is that his tax liability be determined in negotiation or trial represented by counsel not adverse to his interest, and not bound by a document secured under the circumstances alleged and of doubtful validity in execution and under the law. The position of respondent clearly indicates his intention to use the waiver, no matter how secured and with complete indifference to the correct tax liability, to force collection. Appellant asserts that there is no thought in his mind of escaping his true tax liability, regardless of consequences, nor is he resorting to litigation for delay because at his age delay can have serious consequences. Nor is he attempting to "get a second bite at the apple" for the simple reason that he has never had that first

bite of a fair and impartial determination of his correct tax liability.

Respectfully submitted,

WAREHAM C. SEAMAN,

Attorney for Petitioner.

I hereby certify that in my judgment the Petition for Rehearing is well founded, and that it is not interposed for delay.

WAREHAM C. SEAMAN,

Attorney for Petitioner.